UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATALIA KUROVSKAYA, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

- against –

PROJECT O.H.R., INC.,

Defendants.

SDNY Index No.
16-cv-03030 (VM)

New York County Supreme

Index No. 150480/2016

Memorandum of Law

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Plaintiffs submit this reply memorandum of law in further support of their motion to remand the action to New York Supreme Court of the State of New York, where it was initially filed.

I. DEFENDANT CANNOT SATISFY ITS BURDEN THAT MINIMAL DIVERSITY HAS BEEN ESTABLISHED – JURISDICTION UNDER CAFA IS THEREFORE IMPROPER

Defendant, not Plaintiffs, have the burden to prove minimal diversity has been satisfied to confer subject matter jurisdiction under CAFA. *See e.g. Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 59 (2d Cir. 2006). Defendant has failed to satisfy its burden.

Defendant argues that there are putative class members who reside in a state other than New York. However, Defendant's sole proof to support this argument consists of the addresses of two plaintiffs in the action *Bonn-Wittingham v. Project O.H.R. (Office for Homecare Referral), Inc., Metropolitan New York Coordinating Council on Jewish Poverty and D'Vorah Kohn*, 1:16-cv-0054-ARR-JO (E.D.N.Y) (Def. Ex. 2). Defendant's reliance on this information does not however establish minimal diversity in this action.

First, the *Bonn-Wittingham* action represents employees who worked for Project O.H.R. (the defendant in this action), *as well as* employees who worked for the Metropolitan New York Coordinating Counsel on Jewish Poverty ("Met") (*not* a defendant in this action) which also employed workers to provide home care services. (See D's Ex. 2, ¶14.) Defendant's cursory conclusion that all plaintiffs in the *Bonn-Wittingham* action would be putative class members in this action is therefore not necessarily true. Defendant provides no evidence that the two *Bonn-Wittingham* plaintiffs it exclusively bases minimal diversity on worked for Project O.H.R., rather than for Met. Since this action only seeks to represent workers employed by Project O.H.R., anyone who worked only for Met would not be a part of the putative class in this action.

Second, even assuming Defendant could somehow overcome this hurdle, the *Bonn-Wittingham* Complaint relied upon by Defendant does not contain any information about the *citizenship* of these two plaintiffs. Rather, it states that plaintiffs, at all relevant times, were "*residents* of the state and City of New York" and the attached exhibit merely lists "addresses" for the plaintiffs. That two of the 174 plaintiffs in the *Bonn-Wittingham* action listed a mailing address outside of New York is insufficient to establish citizenship under CAFA, as Defendant so eagerly pointed out in its Notice of Removal. (*See* Def. Notice of Removal, ¶16-18 (arguing that Plaintiffs' New York State Complaint was insufficient to allege citizenship because it only stated where the Named Plaintiffs were "currently residing".)) Defendant, falling on its own sword, has therefore failed to submit any evidence whatsoever of a single putative class member's citizenship status.

Defendant in fact concedes that it has no knowledge whatsoever about the citizenship status of putative class members. Defendant clearly states that it "lacks the information on the whereabouts of its nearly 1600 home health attendants…." (Def. Memo. p. 5.). As it is Defendant's burden to prove minimal diversity has been satisfied, this concession unequivocally establishes that Defendant has not, and is unable to, meet its burden. Defendant's failure to provide proof that even one putative class member is a citizen of another state is all the more telling given that Defendant, as Plaintiffs' employer, knows the identity of every member of the putative class, and under New York law was required to keep records of its employees' information. That Defendant stopped employing Plaintiffs approximately one year ago does not absolve Defendant of its burden to prove minimal diversity – current citizenship status can easily be obtained with information already in Defendant's possession. Absent proof of minimal diversity, CAFA jurisdiction cannot lie.

Defendant also argues that minimal diversity is established because putative class members stopped working for Defendant in May of 2015. (Def. memo. p. 6.) Defendant seems to believe that loss of one's job in New York equates to loss of New York citizenship status. This is simply not true and Defendant provides no support for such a farfetched statement.

Although it is not Plaintiff's burden to prove minimal diversity, Plaintiffs note that Defendant does not respond at all to the extensive authority cited by Plaintiffs holding that amendments are permitted after removal to address or clarify issues relevant to CAFA before CAFA jurisdiction is decided so as not to penalize Plaintiffs for drafting pleadings in accordance with more liberal state pleading requirements. (See P's original memo, p. 3.) Given Defendant's lack of opposition, Plaintiffs respectfully request permission to amend their complaint to clarify that they and members of the putative class are all citizens of New York, as opposed to just residents as currently alleged. This modification would more precisely state what was intended all along and unequivocally establish that this Court lacks subject matter jurisdiction of this action under CAFA.

It is Defendant's burden to prove minimal diversity and it has failed to meet its burden. Defendant concedes it does not know the citizenship status of the putative class. Defendant then tries to support minimal diversity by relying on a complaint in another action containing the out of state addresses of two plaintiffs. Upon closer review, the complaint contains no information about the citizenship of these plaintiffs, nor does it specify whether they even worked for Project O.H.R. Even without any further amendments to the complaint, subject matter jurisdiction pursuant to CAFA is improper and the action must therefore be remanded to the New York Supreme Court of the State of New York.

II. EVEN IF CAFA DID APPLY, THE ACTION SHOULD BE REMANDED UNDER CAFA'S EXCEPTIONS

Assuming, *in arguendo*, Defendant could somehow satisfy CAFA's requirements, the action must still be remanded under CAFA's exceptions.

A. It Is Reasonable to Assume That More Than Two-Thirds of the Putative Class Are Citizens of New York Warranting Remand Under the Home State Exception

Both the Local Controversy and Home State Exception require that more than two thirds of the putative class be citizens of New York. Defendant argues that this requirement has not been satisfied, essentially taking issue with Plaintiffs assertion that "because the putative class once worked for Defendant, a New York company, and provided services in the State of New York, it is reasonable to assume that more than two-thirds of the putative class were citizens of New York at the time of filing." (Def. Memo. p. 7.)

To the contrary, as cited in Plaintiffs' underlying motion papers and wholly ignored by Defendant, this type of information is exactly what courts have held is perfectly acceptable to determine citizenship status under CAFA's exceptions. *See Commisso v. Price Waterhouse Coopers LLP*, No. 11 Civ. 5713 (NRB), 2012 U.S. Dist. LEXIS 105151 (S.D.N.Y. July 27, 2012) (stating that when determining citizenship for CAFA's exceptions, Courts may "simply make reasonable assumptions about the makeup of the putative class"); *Mattera v. Clear Channel Communs., Inc.*, 239 F.R.D. 70, 80-81 (S.D.N.Y. 2006) (court assumed citizenship requirement was met because putative class members all worked in New York); *Lucker v. Bayside Cemetery*, 262 F.R.D. 185, 189 (E.D.N.Y. 2009) (court remanded based on "the eminently reasonable assumption" that the majority of people desiring to be buried in a Queens cemetery were New York State residents); *Weider v. Verizon N.Y., Inc.*, No. 14-CV-7378 (FB) (JO), 2015 U.S. Dist. LEXIS 70912, at *4 (E.D.N.Y. June 2, 2015) (court assumed citizenship requirement was met because employer was a citizen of New York and class members performed work solely for New York accounts).

Plaintiffs are surprised Defendant would even contest this fact given that their own evidence overwhelmingly supports that the two-third requirement is easily satisfied. In the *Bonn-Wittingham* action, 172 out of 174 named plaintiffs, or 99%, still reside in New York and are therefore likely citizens of New York. (*see* Def. Ex. 2.) Unlike CAFA's initial requirement to prove minimal diversity, residency information is sufficient evidence to determine citizenship status for CAFA's exemptions because the Court need only make a reasonable assumption about the composition of the putative class. *See Commisso v. PricewaterhouseCoopers LLP*, No. 11 Civ. 5713(NRB), 2012 U.S. Dist. LEXIS 105151, at *4 (S.D.N.Y. July 27, 2012) (relying on residency data provided by human resources department to determine whether CAFA exception applies).

The two cases relied upon by Defendant support that reasonable assumptions about citizenship status can be made based on general information about who comprises the putative class. The putative class in *Fields v. Sony Corp. of Am.*, 2014 WL 3877431 (S.D.N.Y. Aug. 4, 2014) was comprised of interns, almost all of whom were college students. Given that most college students return to their home state during the school year and upon graduation, the court could not reasonably assume that the citizenship requirement was met. *See Id* at *3. The putative class in *Smith v. Manhattan Club Timeshare Ass'n*, 944 F. Supp. 2d 244 (S.D.N.Y. 2013) was comprised of timeshare owners, and plaintiffs could not offer any reason why people on vacation would necessarily be New York citizens as opposed to citizens of any other state. *See Id.* at 252-53. That is a far cry from the putative class in this case, comprised of adults who worked for

Defendant, a New York company, providing services to Defendant's clients exclusively in the state of New York.

As noted in *Smith*, the case relied upon by Defendant, Plaintiffs are not required to *prove* that the citizenship requirement has been satisfied. Rather, Plaintiffs must simply "'create a rebuttable presumption that the citizenship requirement is met.'" *Id*. at 253 (*quoting Commisso*, 2012 U.S. Dist. LEXIS 105151, at *4). In *Smith*, the defendant submitted evidence to rebut the citizenship presumption by providing residency records of the timeshare owners. *Id* at 253. In this case, the evidence Defendant submitted actually confirms the reasonable presumption that the citizenship requirement has been satisfied, as it showed that 99% of all plaintiffs in the *Bonn-Wittingham* action are New York residents.

If this Court finds, as it should, that it is reasonable to assume the two-thirds citizenship requirement is satisfied, remand is required under the Home State exception because Defendant does not dispute, and therefore concedes, that the remaining requirements of the Home State exception have been satisfied. Although Defendant also alleges the existence of a previous class action lawsuit, an element of the Local Controversy exception, Plaintiffs will address that issue under the discretionary Interest of Justice CAFA exception below. Whether the requirements of the Local Controversy exception are also satisfied is moot since remand would already be required under the Home State Exception.

B. The Interest of Justice Discretionary Exemption Would Also Apply

In the unlikely event this Court finds it cannot reasonably assume that two-thirds of the putative class are citizens of New York, for the reasons set forth above it is certainly reasonable to assume that at least one-third of the class are New York citizens. Remand would then be proper under the Interest of Justice discretionary exemption. Defendant's arguments against this exemption are meritless and cannot overcome the fact that Plaintiffs worked for Defendant exclusively in New York, providing services solely to New York residents, and bring claims solely under New York law and therefore the ties that bind Plaintiffs and this action to New York are substantial.

Two of Defendant's arguments should be dismissed outright because they are not enumerated as factors this Court may consider.[1] First, Defendant argues that it would conserve judicial resources if the *Bonn-Wittingham* Action was consolidated with this action. Plaintiffs dispute this would even be true given that the *Bonn-Wittingham* Action has two additional defendants and asserts federal claims not brought in this action. However, conservation of judicial resources is not one of the six enumerated factors that may be considered under this exemption. *See* 28 U.S.C. § 1332(d)(3)(A)-(F). Second, Defendant argues the Interest of Justice exemption should not apply because collective and class certification was denied in another action against Defendant, *Severin v. Project Ohr, Inc.*, 2012 WL 2357410 (S.D.N.Y. 2012). There is no collective action in this case since that is an exclusive remedy under the FLSA. Regardless, whether Plaintiffs are able to eventually certify the class is not one of the six enumerated factors that may be considered and Defendant provides no rational or authority otherwise.

[1] The six factors are: "(A) whether the claims asserted involve matters of national or interstate interest; (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States; (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed." 28 U.S.C. § 1332(d)(3).

Defendant's other arguments are similarly unavailing. Defendant argues that the *Bonn-Wittingham* Action was filed before this present action. This is simply not true. Plaintiffs filed their action against Defendant in the Supreme Court of the State of New York, County of New York, on *January 20, 2016*. [*See* Lusher Decl. Ex. A.] The *Bonn-Wittingham* Action was filed on February 2, 2016, which is clearly *after* Plaintiffs filed their class action. Defendant tries to underhandedly rely on the date of Plaintiffs' amended complaint while wholly ignoring the date Plaintiffs filed this class action, which was contained in their initial pleadings. Defendant provides no legal justification whatsoever for why the date the class action was initially filed should not be controlling. Although this factor is not dispositive, in any event, it weighs in favor of remand.

Defendant also states, without any support or justification, that federal interpretation of the law will be required in this action just like in the *Bonn-Wittingham* Action. However, the *Bonn-Wittingham* Action involves FLSA claims, while this action contains only New York State law claims of which Plaintiffs sought adjudication in New York State Court.

Defendant also incorrectly asserts that this matter involves "interstate interest" because Plaintiffs did not limit the putative class to New York citizens. (Def. memo p. 10.) This argument makes no sense because the Interest of Justice exception only applies if more than one-third but less than two-thirds of the putative class were New York citizens. The exception is therefore expressly designed to apply when at least 33 1/3 percent of the putative class are not New York citizens. Defendant provides absolutely no explanation why any other state would have a substantial and overriding interest in whether or not a New York company, that only employed workers in New York to service New York clients, which no longer even employs any workers, complied with New York state's wage and hour laws. Defendant's silence is telling.

Defendant does not dispute the vast majority of the analysis Plaintiffs provided in their underlying motion papers regarding why the totality of the circumstances warrants remand in the interests of justice under the six enumerated factors of the CAFA exception. Nor can they. It is axiomatic that this action involves claims only under New York law, that New York has a great interest in adjudicating this lawsuit because the largest percentage of putative class members are reasonably assumed to be citizens of New York State, that Defendant employed the putative class to provide services to clients solely within the State of New York, and that the alleged injuries sustained by Plaintiffs and members of the putative class were incurred in the State of New York. Defendant similarly cannot dispute that Plaintiffs' claims for spread of hours wages, failure to pay wages, and breach of contract under NY Public Health Law have no similar federal counterparts and are uniquely New York statutory claims.

Remand under the Interests of Justice exception is therefore proper in the event this Court finds it reasonable to assume that more than one-third but less than two-thirds of the putative class are citizens of New York.

C. Limited Discovery

Although this Court should have sufficient information to make a reasonable assumption regarding the citizenship composition of the putative class, discovery on this issue should be permitted in the unlikely event this Court is unable to make such a determination. Defendant opposes this limited discovery saying it "has little information, readily available or otherwise, as to the citizenship of the putative class members…since Project OHR stopped employing the putative class members nearly a full year before suit was filed, in May 2015 or long before." (Def. memo. p. 13.) Defendant however, as an employer, is legally obligated to maintain accurate payroll and tax records for each employee for a minimum of six years. *see* N.Y. Codes

R. & Regs, 12 § 142-2.6(a)(4) (requiring that employers establish and retain, for not less than six years, payroll records for each employee); New York Labor Law § 661 (same). If Defendant is arguing it no longer has such records, it cannot benefit from its failure to obey the law. If on the other hand, Defendant is arguing that its records may not be current, that is immaterial for purposes of CAFA's exceptions because last known residency information is sufficient evidence. *See Smith*, 944 F. Supp. 2d at 253 (residency information of those who currently owned a timeshare was sufficient to reasonably assume citizenship status for entire putative class) (*citing Commisso*, 2012 U.S. Dist. LEXIS 105151, at *4 (relying on last known residency data provided by human resources department to determine whether CAFA exception applies and finding that)).

Defendant's further argue that Plaintiffs have somehow not done enough to "earn" the right to discovery. While the plaintiffs in *Abdale v. N. Shore-Long Is. Jewish Health Sys., Inc.*, 2014 WL 2945741 at *8-10 (E.D.N.Y. June 30, 2014) may have provided some additional information, there is no holding that doing so was a prerequisite to discovery on this issue. Indeed, plaintiffs produced no documentary evidence regarding citizenship status for any putative class members when Judge Carter recently ordered discovery on this exact issue in *Reid v. Primerica Financial Services Agency of New York, Inc.*, 14-cv-07796-ALC (S.D.N.Y. Sept. 28, 2015) (Docket No. 34.) Plaintiffs wonder how they are even supposed to provide this information when the identity of the putative class members is exclusively in Defendant's possession.

CONCLUSION

For the reasons set forth above and those in the underlying motion papers, Plaintiffs respectfully request this Court grant Plaintiffs' motion to remand this action in its entirety back to the Supreme Court of the State of New York.

Dated: New York, New York
June 22, 2016

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